STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 5, 2009
v	No. 278973 Wayne Circuit Court
CHRISTOPHER COBB, Defendant-Appellant.	LC No. 05-011055

Before: Sawyer, P.J., and Murray and Stephens, JJ.

PER CURIAM.

Pursuant to a plea and sentencing agreement, defendant pleaded guilty of assault with intent to commit murder, MCL 750.83, and was sentenced to a prison term of 15 to 30 years. We granted defendant's delayed application for leave to appeal, and now affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that he was "coerced" into pleading guilty because defense counsel was ineffective when, rather than advising defendant that he had a valid self-defense, he instead advised defendant to accept the plea to avoid potential murder charges if the victim died.

To evaluate a claim of ineffective assistance of counsel arising out of a guilty plea, a court must determine whether the plea was tendered voluntarily and understandingly. *People v Davidovich*, 238 Mich App 422, 425; 606 NW2d 387 (1999), aff'd 463 Mich 446 (2000); *People v Mayes* (*After Remand*), 202 Mich App 181, 183; 508 NW2d 161 (1993). With respect to a claim that counsel was ineffective in advising a defendant to accept a plea, the issue is whether counsel's advice was within the range of competence demanded of attorneys in criminal cases, not whether the court in retrospect considers the advice to have been wrong. *Mayes*, *supra* at 183-184.

The record does not support defendant's argument that he had a viable defense of others defense. A person may act in defense of others when the person honestly and reasonably believes that another person (a fetus in this case) is in danger of imminent death or great bodily harm and the use of deadly force is necessary. See *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002); *People v Kurr*, 253 Mich App 317, 328; 654 NW2d 651 (2002). The witnesses who testified at the preliminary examination did not see or hear the complainant threatening defendant's pregnant fiancée. No one saw the complainant with a weapon. Defendant's statements to the police indicated that he thought the complainant was going to hurt

his fiancée because he looked at her with "evil eyes" and started walking in her direction. A competent attorney could reasonably conclude that these observations would not persuade a jury that defendant held an honest and reasonable belief that the fetus was in danger of imminent death or great bodily harm. Further, the evidence showed that defendant did not attempt to first restrain the complainant, and that he repeatedly struck him in the head with a baseball bat. The likelihood of persuading a jury that the repeated strikes were necessary was negligible.

Defendant argues that, at a minimum, imperfect self-defense would have mitigated second-degree murder to voluntary manslaughter, for which the guidelines range would have been only 19 to 38 months. Imperfect self-defense applies when self-defense fails *only* because the defendant was the initial aggressor. *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). It does not apply if the killing was not immediately necessary. *Id*. An imperfect self-defense theory would not ameliorate the deficiencies in defendant's defense of others theory and the likelihood of persuading a jury that he was guilty of voluntary manslaughter on this theory was also negligible. Under the circumstances, counsel's advice to accept the plea agreement was within the range of competence demanded of criminal attorneys. Therefore, counsel was not ineffective for advising defendant to accept the plea.

Defendant also argues that there was an insufficient factual basis for his plea because he denied intending to murder the complainant. In reviewing the adequacy of the factual basis for a plea, this Court examines whether a factfinder could properly convict on the facts elicited from the defendant at the plea proceeding. *People v Brownfield* (*After Remand*), 216 Mich App 429, 431; 548 NW2d 248 (1996). The elements of assault with intent to commit murder are an assault with an actual intent to kill, which, if successful, would make the killing murder. *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005).

Although defendant denied having an intent to kill, that intent may be reasonably inferred from his admission that he hit the complainant twice in the head with a baseball bat. "Disclaimers by the defendant during the plea taking . . . of intent to kill . . . do not preclude acceptance of a plea since on the defendant's own recital a jury could properly infer the requisite . . . intent." *People v Haack*, 396 Mich 367, 376-377; 240 NW2d 704 (1976). "A guilty plea may be accepted even though the defendant is unsure of his guilt and even where he denies his guilt if after *careful* inquiry the judge satisfies himself that there is a substantial factual basis for the plea and that the plea represents a well-considered and well-advised choice by the defendant." *Id*. at p 378 (citation and internal quotation marks omitted) (emphasis in original). Thus, the trial court did not abuse its discretion by denying defendant's motion to withdraw the plea on the grounds that the factual basis was deficient.

Defendant argues that, at most, he should have been charged with assault with intent to do great bodily harm. He cites *People v Hogan*, 225 Mich App 431, 433; 571 NW2d 737 (1997), and *People v Kotesky*, 190 Mich App 330, 331; 475 NW2d 473 (1991), for the proposition that a guilty plea does not waive a claim that a charge was brought under an "inapplicable statute." In the latter case, the defendant claimed that a more specific statute proscribed her actions. In the former case, the defendant was essentially challenging the factual basis for the plea.

In this case, defendant's assertion that the assault with intent to commit murder statute was "inapplicable" is based on his contention that the prosecution would not have been able to prove his factual guilt of that offense. Such an issue is waived by a guilty plea. *People v New*,

427 Mich 482, 491; 398 NW2d 358 (1986). Therefore, the trial court did not abuse its discretion by denying defendant's motion to withdraw on this ground.

Relying on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), defendant argues that he is entitled to resentencing because offense variables 5, 6, and 10 of the sentencing guidelines were improperly scored on the basis of facts that were not proven beyond a reasonable doubt to a jury. However, the principles set forth in *Blakely* do not apply to Michigan's indeterminate sentencing system. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).[1]

Finally, defendant argues that defense counsel was ineffective for "allowing [him] to plead to a sentence above the highest level of the properly scored guidelines." The issue is whether the advice was within the range of competence demanded of attorneys in criminal cases, and not whether the court in retrospect considers the advice to have been wrong. *Mayes*, *supra*, pp 183-184.

The record indicates that at the time of the plea, the parties believed that 15 years was at the high end of the sentencing guidelines range for assault with intent to commit murder. Even if the properly scored guidelines range is lower, that does not establish that counsel was ineffective. Parties may agree to a sentence that exceeds the guidelines range. See, e.g., See *People v Wiley*, 472 Mich 153, 154; 693 NW2d 800 (2005). The premise of defendant's argument seems to be that defense counsel erred in anticipating what the guidelines range would be, and had counsel been more accurate, a better deal could have been reached. However, "[c]ounsel's incorrect prediction concerning defendant's sentence . . . is not enough to support a claim of ineffective assistance of counsel." *In re Oakland Co Prosecutor*, 191 Mich App 113, 124; 477 NW2d 455 (1991). Moreover, defendant assumes that the prosecutor would have agreed to a lesser sentence, but there is no factual support for that assumption.

Affirmed.

/s/ David H. Sawyer
/s/ Christopher M. Murray
/s/ Cynthia Diane Stephens

[1] To the extent that defendant challenges the scoring of the offense variables and argues that he is entitled to resentencing because he agreed to a 15-year minimum sentence as part of a plea agreement and was sentenced in accordance with that agreement, he has waived the right to challenge his sentence on appeal. See *People v Blount*, 197 Mich App 174, 175-176; 494 NW2d 829 (1992) ("a defendant who pleads guilty and is sentenced in accordance with a plea bargain and sentencing agreement waives the right to challenge the sentence unless there is also an attempt to withdraw the plea for a sound legal reason.").